SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 440

CLIVE MICHAEL BOUTILIER, PETITIONER,

vs.

THE IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 28, 1966

[fol. 1]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

RECORD OF SWORN STATEMENT—January 13, 1964

File No.: A10 082 545

In re: CLIVE MICHAEL BOUTILIER

Present

Respondent: CLIVE MICHAEL BOUTILIER

Investigator: JAMES B. SARSFIELD

Stenographer: Recorded (Dictaphone)

Place: 20 West Broadway
New York, N.Y.

Language: English

Date: January 13, 1964

[fol. 2] Investigator Sarsfield to Respondent:

Q. I am an officer of the United States Immigration and Naturalization Service, and I desire to question you under oath regarding your homosexual activities. Any statement you make must be made voluntarily and of your own free will. Such statement may be used against you by the Government as evidence in any civil or criminal proceeding. Are you willing to make such a statement under oath?

A. I do.

Q. Do you swear that the statement you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. Will you please stand and raise your right hand? Do you swear that these statements that you are about to make will be the truth, the whole truth and nothing but the truth, so help you God?

A. To the best of my ability.

Q. What is your true and correct name?
A. Clive Michael Boutilier.
Q. Have you ever used any other name?
A. No.
Q. What is your date and place of birth?
A. September 3rd, 1933, Sheet Harbor, Nova Scotia.
Q. Could you spell Sheet Harbor, Nova Scotia?
A. S-h-e-e-t H-a-r-b-o-u-r N-o-v-a S-c-o-t-i-a.
Q. Of what country are you a citizen?
A. Canada.
Q. Where were your parents born?
A. Canada.
Q. Was your father ever in the United States?
A. For a visit only.
Q. Did he ever reside here permanently?
A. No.
Q. Has your mother ever resided permanently in the United States?
A. Yes, she's here since 1956 on a visa.
Q. She resides here in New York City?
A. Yes, in Brooklyn.
[fol. 3] Q. Of what country is your mother a citizen?
A. Canada.
Q. Of what country was your father a citizen?
A. Canada.
Q. How long ago did your father pass away?
A. About 1957.
Q. Have you ever been married?
A. No.
Q. Have you ever had any children?
A. No.
Q. Do you have any claim to United States citizenship at this time?
A. No.
Q. When did you last enter the United States?
A. I entered the United States on June 22, 1955 at New York for permanent residence.

Q. How many trips have you made outside the United States since you entered for permanent residence in 1955, approximately?

A. Approximately four for vacations.

Q. What was the longest length of time you were gone?

A. Two weeks I went to Trinidad in the British West Indies.

Q. And when was the last time you left the United States for a visit?

A. I believe it was three years ago for Christmas vacation.

Q. Where did you go on this Christmas vacation?

A. Lansdowne, Mictou County, Nova Scotia.

Q. Could you spell out the name of that county?

A. M-i-c-t-o-u County.

Q. And when you returned at what port in the United States did you enter?

A. New York.

Q. Were you ever in the United States before you entered for permanent residence on June 22, 1955?

A. No.

[fol. 4] Q. Were you ever arrested outside the United States?

A. No.

Q. Were you ever arrested in the United States?

A. Yes.

Q. Could you tell me when, where and on what charge you were arrested in the United States?

A. It was October 2nd, 1959 at Brooklyn, New York, sodomy charge and it was DOR on September . . . March 12, 21, 1960.

Q. Why was it DOR, and by DOR do you mean discharged on your own recognizance?

A. Yes, it was dismissed because the complainant failed to appear in the court.

Q. Actually it wasn't dismissed because. . . . did the judge say it was dismissed?

A. No, it was dismissed on my own recognizance, because...

Q. This charge of sodomy, what did it involve?

A. I inserted my penis in his rectum and had an orgasm.

Q. Did anything else happen besides that?

A. Yes, later I put my penis in his mouth and had a blowjob.

Q. Was this voluntary on the part of the person with whom you were doing these acts?

A. Yes.

Q. Was it voluntary on your part?

A. Yes.

Q. Do you remember the name of this person?

A. No. I don't recall the name.

Q. Was this a man that you performed these acts with?

A. Yes.

Q. What do you mean by an orgasm?

A. Ejaculate.

Q. What do you mean by ejaculate?

A. I had my sex myself.

Q. Can you be more specific by what you mean by orgasm?

A. A flow of sperm came from my penis.

[fol. 5] Q. Were you ever arrested anywhere else in the United States at any time?

A. No.

Q. When did you have your first homosexual act? Approximately?

A. Approximately when I was fourteen.

Q. With whom did you have this act?

A. With another man.

Q. Was this man younger than you or older than you?

A. Older.

Q. How much older?

A. He was approximately forty.

Q. What actually took place with this man when you were fourteen years of age?

A. We had planned a hunting trip and I stayed at his home that night, his wife was away, and we shared the same bed. He tried to put his penis in my rectum. He didn't succeed but a flow of sperm came from his penis on my clothing.

Q. Where did this take place?

A. In Canada.

Q. Whereabouts in Canada?

A. In (unintelligible) County, Nova Scotia.

Q. Did you say that it was at his home?

A. Yes.

Q. How do you spell Picto County?

A. P-i-c-t-o-u.

Q. Did any other acts of that nature take place with this man?

A. No.

Q. When did you have your next act . . . when did you have . . . this occurred when you were fourteen years of age?

A. Yes.

Q. When did you have a homosexual act after this? About how long ago?

A. About two years after that.

Q. And where did this occur?

A. In Halifax, Nova Scotia.

Q. Whereabouts in Halifax, Nova Scotia?

A. In a public park.

Q. And what occurred?

A. I got a blowjob . . . from

[fol. 6] Q. From what?

A. A man.

Q. Did you know this man at all?

A. No.

Q. Approximately how old was he?

A. Maybe early thirties, probably.

Q. When you say a blowjob, what do you mean by a blowjob?

A. I put my penis in his mouth and a flow of sperm came from my penis.

Q. On how many occasions did you have these blowjobs in Halifax?

A. I had them twice at that place.

Q. This was when you were about 16 years of age?

A. Yes.

Q. And after these two blowjobs in Nova Scotia, in Halifax, that you mentioned when did you again have a homosexual act?

A. It was on an average of three or four times a year for the next six or seven years in Halifax and in Pictou County.

Q. Was this all prior to your entry into the United States on June 22, 1955?

A. Yes.

Q. These acts that you mentioned that took place on the average of three or four times a year, for the six or seven years prior to your entry into the United States in 1955 were they all blowjobs as you described above, or was there any other variation?

A. No, all blowjobs.

Q. Prior to your entry in the United States did you ever have sexual relations with a woman?

A. Yes.

Q. How often?

A. Three or four times.

Q. Three or four times prior to your entry into the United States. No more?

A. No.

Q. I have been asking you about your homosexual activity and I haven't asked you what you mean by homosexual activity. Could you please explain to me what you mean [fol. 7] by homosexual activity, or homosexual acts?

A. Acts of two people of the same sex.

Q. What type of act?

A. Sexual act.

Q. Since your entry into the United States on June 22, 1955 approximately how many times have you had homosexual relations with other men?

A. On an average of three or four times a year over the seven year period, I think.

Q. Let's see, you came in in 1955, on June, 1955, so it would be about 8½ years.

A. Yes.

Q. Where do you now live?

A. 486 4th Street, Brooklyn.

Q. Do you liye by yourself or with someone else?

A. No, I share an apartment.

Q. With whom?

A. Eugene O'Rourke.

Q. Have you ever had homosexual relations with Eugene O'Rourke?

A. Yes.

Q. When was the last time you had homosexual relations with Eugene O'Rourke?

A. Approximately eight months ago.

Q. Did you have relations . . . how long have you been living with Mr. O'Rourke?

A. Since 1959.

Q. And how often up to eight months ago have you had homosexual relations with Eugene O'Rourke? Approximately?

A. Approximately twice, three times a year.

Q. When was the last time you had homosexual relations with anyone?

A. I think it was in September of 1963.

Q. Where did this take place?

A. In Manhattan.

Q. Do you remember with whom it was?

A. I don't know the name, no. I never did know the name.

Q. And what this involve?

[fol. 8] A. I put my penis in his mouth and a flow of sperm came from my penis. It happened in his apartment.

Q. What type of homosexual acts did you perform with Eugene O'Rourke?

A. The same as I just mentioned with the other one.

Q. By that do you mean blowjob?

A. Yes.

Q. As you described above?

A. Yes.

Q. Is this Mr. O'Rourke an alien?

A. No. He's a U.S. citizen.

Q. He was born in the United States?

A. Yes.

Q. Have you ever had homosexual relations with another man for money?

A. No.

Q. All these homosexual acts that you mentioned up to now, have they ever been other than voluntary?

A. No, all voluntary.

Q. Voluntary on your part and voluntary on the part of the person with whom you were performing the act?

A. Yes.

Q. With regard to the arrest that we spoke of before, when you were arrested in New York on October 2, 1959 on a charge of sodomy, I have here a copy of New York City Police Department Criminal Record which reflects that arrest. Would you please read it and if it does apply to you would you put your name and the date on the back of it?

A. (no answer heard)

Q. Have you registered for selective service since you have been in the United States?

A. Yes.

Q. What is your present classification?

A. (no answer heard)

Q. (Let the record show that the respondent presents Selective Service Notice of Classification in his name Clive Michael Boutilier, Sel. Svce. No. 504233723, reflecting his [fol. 9] classification as 4-F, on Dec. 24, 1957 at the local

board. The local board being No. 42 at 250 Livingston St., Brooklyn, N.Y.)

Could you tell me why they classified you 4-F?

A. I'm homosexual.

Q. Did they just accept your statement that you're a homosexual?

A. After filling out the forms and asking the questions I was sent to see a psychiatrist and as a result I'm classified 4-F.

Q. You mean one of the questions on the form asks whether or not you are a homosexual and you answered Yes?

A. Yes.

Q. Do you have an alien registration card with you?

A. Yes.

(Let the record show that respondent presents his alien registration card (Form I-151A) in the name of Clive Michael Boutilier, A-10 082 545, reflecting his admission to the United States as an immigrant on June 22, 1955 at New York as Type 0-1, and his date of birth as Sept. 3rd, 1933.)

Q. Do you have a social security card with you?

A. Yes. No, excuse me I must have lost it.

Q. Are you presently employed?

A. Yes, I'm employed with Kennecott Copper Corp. here in Manhattan as . . .

Q. As what?

A. As a utility man.

Q. Do you have anything else to add to this statement?

A. No, just that shortly I plan to seek medical help and I guess that's about it. Due to the finances I couldn't get around to get this medical help before this.

[fol. 10] I have read the foregoing statement, consisting of 9 pages, and I state that the answers made therein by me are true and correct to the best of my knowledge and belief, and that this statement is a full, true and correct record of my interrogation on the date indicated by above-

named officer of the Immigration and Naturalization Service. I have initialed each page of this statement and the correction noted on page(s)

.....

Subscribed and sworn to before me at 20 West Broadway, New York, N. Y. on .....

.....

JAMES B. SARSFIELD, Investigator
U.S. Immigration and Naturalization Service.

Witnessed by:

.....

I hereby certify that the foregoing statement, consisting of 9 pages, is a true and correct transcript of the Recorded Belt Material taken in this matter on January 13, 1964.

M. GUERRERO
Stenographer

[fol. 11]

EXHIBIT 4—CERTIFICATION OF USPHS

[Stamp—Imm. & Nat. Service—N.Y.C. Mail Unit—1964 Jan. 20 PM 3:58]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PUBLIC HEALTH SERVICE

[Emblem]

U. S. PUBLIC HEALTH SERVICE HOSPITAL
STATEN ISLAND 4, NEW YORK

C PSY

January 17th, 1964.

To: The District Director
Immigration & Naturalization Service
20 West Broadway
New York, New York.

Subject: Clive Michael Boutilier—A-10 082 545 S-JBS

Dear Sir:

This is to certify that the attached sworn statement in the case of the above named alien has been reviewed by the undersigned.

On the basis of the information contained in this statement it is our opinion that the alien was afflicted with a class A condition, namely, psychopathic personality, sexual deviate, at the time of his admission to the United States for permanent residence on June 22nd, 1955.

Very truly yours,

/s/ PAUL G. SMITH, M.D.
Paul G. Smith, M.D.
Sr. Surgeon, USPHS
Chief, Psychiatry

/s/ MARIA SARRIGIANNIS, M.D.
Maria Sarrigiannis, M.D.
Medical Director, USPHS

Enclosure

[fol. 12]

EXHIBIT 6—REPORT OF DR. FALSEY

EDWARD F. FALSEY, M. D.
142 JORALEMON STREET
BROOKLYN 1, N. Y.

TRIANGLE 5-5034

March 2, 1964

Mr. Robert P. Brown
320 Broadway
New York, New York

RE: Clive Boutelier
486 4th Street
Brooklyn, New York

Dear Mr. Brown:

Thank you for suggesting that the above patient consult me concerning the difficulties which have arisen in relation to his application for citizenship.

Now 30 years of age, he explained quite frankly that he has been homosexual and that he had one arrest while living in an apartment on 16th Avenue in Brooklyn. At the time of his first interview as well as in subsequent examination on February 16th, this patient gave a complete account of his past and family history, stating that he was born in Shelt Harbor, Halifax County, Nova Scotia, on September 3, 1933. Clive was the eldest son with an older sister, Phyllis, who is now 34, married with 8 children and living in Wellin, Ontario. A brother, Andrew, 28, is married with 2 children in New Jersey. Danny, 26, is married with one child, was in the U.S. Military Service. A sister, Roseanne, now 20, is married and is living in Brooklyn and the youngest brother, Paul, is 18 and makes his home with the patient's mother who is 49 and who is working as a practical nurse. Mr. Boutelier's father died in 1957 of heart disease.

Evidently of good intelligence, this patient is working steadily as a building maintenance man for Kenilworth Company at 161 East 42nd Street. Earlier, he served at attendant and companion to a man who was mentally ill and the patient performed responsibly in the role of companion.

On psychiatric examination of Mr. Boutelier, there was no indication of delusional trend or hallucinatory phenomena. He is not psychotic. From his own account, he has a psychosexual problem but is beginning treatment for this disorder. Diagnostically, I would consider him as having a Character Neurosis, believe that the prognosis in therapy is reasonably good and do not think he represents any risk [fol. 13] of decompensation into a dependent psychotic reaction nor any potential for frank criminal activity.

I am planning to see him in further interviews and will advise you of subsequent developments.

Very truly yours,

/s/ Edward F. Falsey, M.D.
(Qualified Psychiatrist)

EFF:ms

[fol. 14]

EXHIBIT 7—REPORT OF DR. ULLMAN

MONTAGUE ULLMAN, M. D.
4802 TENTH AVENUE
BROOKLYN 19, N.Y.

DIRECTOR OF PSYCHIATRIC SERVICES
MAIMONIDES HOSPITAL OF BROOKLYN
PROFESSOR OF PSYCHIATRY
STATE UNIVERSITY OF NEW YORK

March 30, 1965

Clinical Abstract BOUTILIER, Clive Michael

Mr. Clive Boutilier is a thirty-two year old, white male seen in consultation on March 30, 1965 at the request of his attorney, Blanch Freedman. Mr. Boutilier was cooperative during the interview but appeared extremely tense and anxious. As soon as he began to speak and from time to time throughout the interview his eyes teared. His initial spontaneous outburst was to the effect that the proceedings against him over the past six years were forcing him to make bank loans and for the first time in his life he was unable to financially cope with what was happening to him.

Mr. Boutilier comes from a family of six siblings raised on a small farm in Canada. He is the second oldest. A sister, aged 34, and a brother, aged 30, are in Canada. The others are all in the States. His three brothers are married. There is no history of any nervous and mental disorder in the family and no history of any sexual problems among any of his siblings. His father died eight years ago. His mother remarried and the patient is now living with his mother and stepfather.

The patient recalls very little about his early years except that everyone had to work to maintain the farm. His own schooling was interrupted at the age of thirteen so that he could contribute to the support of his family. His father

and mother fought a great deal. He felt very close to his mother and tended to take her side in these arguments.

The patient was not aware of any feelings of difference or difficulties of any kind during his childhood. He had no sexual experiences until the age of sixteen when he was apparently seduced by an older man. There followed a period of sporadic occasional experiences, mostly with older men and usually initiated by them. This was the pattern which persisted after coming to the States until [fol. 15] about eight years ago when he moved in with a homosexual male with whom he remained for about seven years. The patient never sought out homosexual contacts or relationships on his own and the occasion on which he was picked up was the only one in which he was involved with a minor.

The patient has had sexual interest in girls and has had intercourse with them on a number of occasions. He has at times become interested in a girl but develops acute anxiety and withdraws when the girl herself has expressed a serious interest. He has abandoned all sexual practices within the past several months because of his annoyance and disgust with the problems these activities have brought about.

Mr. Boutilier has made a good work adjustment in this country. He has held his current job for three years as a maintenance worker with a copper concern. He is well liked, conscientious about his work and concerned with doing a very good job. He has moved back to living with his mother and stepfather and his life at the present time is very circumscribed. His evenings are spent mostly at home. He occasionally goes bowling. He attends mass but otherwise does not go regularly to church.

The patient's present difficulties obviously weigh very heavily upon him. He feels as if he has made his life in this country and is deeply disturbed at the prospect of being cut off from the life he has created for himself. He talks frankly about himself. What emerged out of the in-

terview was not a picture of a psychopath but that of a dependent, immature young man with a conscience, an awareness of the feelings of others and a sense of personal honesty. His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. My own feeling is that his own need to fit in and be accepted is so great that it far surpasses his need for sex in any form.

I do not believe that Mr. Boutilier is a psychopath.

/s/ Montague Ullman
Montague Ullman, M.D.

MU/eb

[fol. 16]

Before the Immigration and Naturalization Service

Transcript of Hearing on July 26, 1965 Before Special Inquiry Officer

Colloquy Between Special Inquiry Officer and Counsel

Special Inquiry Officer to Respondent:

Q. Sir, do you speak and understand the English language?

A. Yes, sir.

Q. What is your full, true and correct name?

A. Clive Michael Boutilier.

Q. You were previously before me on March 8, 1965 and your hearing was adjourned until today for completion, that is the purpose of the hearing today. Are you still represented by Miss Freedman?

A. Yes.

Q. Will you please stand up and raise your right hand? Do you solemnly swear that the testimony you will give

today will be the truth, the whole truth, and nothing but the truth, so help you God?

A. So help me God.

Special Inquiry Officer: Now, Miss Freedman, Mr. Schiano has been telling me that you and he have apparently reached certain understanding with regard to the evidence and the procedure in this case. I would like to know whether what I have noted down is a correct understanding. The first is that exhibit 3, which is the statement of January 13, 1964, is a correct transcript to what this man testified to with the exceptions that are noted in your letter of May 11, 1965,—

Miss Freedman: That is correct, sir.

Special Inquiry Officer: Which are concerned principally with dates and details.

Miss Freedman: That is correct.

Special Inquiry Officer: All right, the letter of May 11, 1965 will be made part of Exhibit 3. It will be referred to [fol. 17] as Exhibit 3-B. Am I correct also in your client's own statement that the disposition of the criminal matter in 1959 was that he was discharged on his own recognizance?

Miss Freedman: That is correct, and it was later completely dismissed.

Special Inquiry Officer: It was later completely dismissed?

Mr. Brown: Counsel present Robert Brown.

Special Inquiry Officer: Do you have anything Mr. Brown—

Mr. Brown: I do not have a transcript but I can secure that.

Special Inquiry Officer: Were you the attorney in the proceedings?

Mr. Brown: Yes.

Mr. Schiano: I will accept counsel's representation on this.

Special Inquiry Officer: This was dismissed after it was pending six months?

Mr. Brown: Six months after the discharge on his own recognizance.

Special Inquiry Officer: What is your name, counsel?

Mr. Brown: Robert Brown, 305 Broadway, New York 7, N.Y. and I was attorney of record for Mr. Boutilier during those proceedings in Special Sessions Court in Kings County.

Special Inquiry Officer: Now, thirdly, that you wish to submit as psychiatric evidence two letters from two psychiatrists which I have before me. One of March 2, 1964 from Edward F. Falsey, 142 Joralemon Street, Brooklyn 1, New York and one of March 30, 1965 from Montague Ullman, of 4802 Tenth Avenue, Brooklyn 19, New York. Does the Government have any objections to these being made part of the record?

Mr. Schiano: No, except I wish to make the observations of the Government's position where the doctors refer to psychopathic personality that we do not maintain as speaking the same context. We maintain that psychopathic per-
[fol. 18] sonality as referred to in allegation No. 4 and in Exhibit 4 is a statutory and a legal term.

Special Inquiry Officer: All right, with that stated position of the Government they will be made part of the record as Exhibit 6 and Exhibit 7 respectively. I then understand that this is the only psychiatric evidence that you intend to submit, Miss Freedman. Is that correct?

Miss Freedman: That is correct. Pardon me, did you say the numbers were 6 and 7?

Special Inquiry Officer: Is my understanding also correct that the respondent was not examined by the United States Public Health Service and declined to submit to such an examination. Is that correct?

Miss Freedman: That is correct.

Special Inquiry Officer: Is it also my understanding that this psychiatric material, Exhibits 6 and 7 were not submitted to the United States Public Health Service for reconsideration of their findings?

Miss Freedman: It is correct, but I would like the record to reflect that there is absolutely no objections on the part of respondent or respondent's counsel to have that material submitted to Dr. Smith—

Mr. Schiano: I don't think it would change the question that we are getting at here though.

Special Inquiry Officer: Well, as I understand it, and I come now to the last part of the stipulation or understanding, which is, that if this material were submitted to the Public Health doctor, or if he appeared and testified regarding this material, that he would testify that at the time of the respondent's arrival in the United States he had been [fol. 19] a sexual deviate and that under the Regulations of the Public Health Service, the Public Health doctor would be required to certify that he was a psychopathic personality within the meaning of the Public Health Regulations.

Miss Freedman: That is correct.

Special Inquiry Officer: Does that correctly state your position?

Miss Freedman: Yes.

Special Inquiry Officer: And that in view of the fact that there is no serious contest as to whether or not this respondent was a sexual deviate but only as whether he is a psychopathic personality that there would be no useful purpose served in re-submitting it to Public Health or having Public Heath Service appear to testify.

Miss Freedman: That is correct. May I add that I would like your statement to include the Regulation No. 6 of the Manual For Medical Examinations of Aliens so that we would be clear that we are talking about that section which directs that sexual deviates be classified under the term of and in the category of psychopathic personality?

Special Inquiry Officer: All right, we will do better than that, Miss Freedman, we will make a photostatic copy of the applicable page, that would be page 6-5 part of this record as Exhibit 8. Now, is there any or will there be any request for discretionary relief in this case other than termination of proceedings?

Miss Freedman: No, I don't know that he is available for any discretionary relief under these circumstances, unless you are talking about voluntary departure.

Special Inquiry Officer: Well, I think he would have the [fol. 20] same problem basically with either voluntary departure or suspension of deportation. Those appear to be the only two possible remedies but for either of those we would have to be able to reach a conclusion that he has been a person of good moral character during the past five years, at least five years. For suspension it would be longer.

Miss Freedman: I don't see that he is statutorily eligible in the light of these things.

Special Inquiry Officer: I am inclined to agree but I can't foreclose you from making the applications.

Miss Freedman: I am not going to make a meaningless application, sir, so that there is no application for any discretionary relief.

Mr. Schiano: Counsel wanted to make one further observation.

Miss Freedman: I would like to make a further observation if I might with respect to the subject dealing with the Regulation 6 (a) and (b), and mainly, that in this case sexual deviation is homosexuality.

Special Inquiry Officer: In other words you are making the point that there might be other types of sexual deviation which would be more, let's say, consonant with psychopathic personality, or diagnosed as psychopathic personality?

Miss Freedman: Correct.

Special Inquiry Officer to Respondent:

Q. Now, Mr. Boutilier, if you should have to be ordered deported, you have a right under the law to say to which country you would prefer to be sent. In such case to which country would you prefer to be sent?

A. Canada.

Q. Is there any reason why you fear to return to Canada? [fol. 21] A. No, sir.

Special Inquiry Officer: Miss Freedman, I think perhaps the facts in this matter ought to be brought up-to-date with regard to any criminal records, present occupation, activities or anything of that sort. Would you do that, please?

Miss Freedman to Respondent:

Q. Mr. Boutilier, are you working in the same place you worked when you last appeared here?

A. Yes, ma'am.

Q. Will you give them the name of the place?

A. Kennecott Copper Corporation, 122 East 42nd Street, Manhattan.

Q. And you have been there consistently employed for approximately how long?

A. Approximately two and a half years.

Q. Now, with respect to your residence, I believe since you were last here or at some point since the statement was last taken, you changed not the apartment house that you lived in but the apartment within which you dwell. Is that correct?

A. Yes, ma'am. I now live with my parents.

Q. You no longer have an apartment of your own. Is that correct?

A. No, ma'am.

Q. Have you at any time been arrested for any offense, crime or other activity that is not part of this record?

A. No, ma'am.

Q. Did you ever leave the country since 1959 or since you were last here?

A. The last time I left the country was for my father's funeral on April 27, 1959.

[fol. 22] Special Inquiry Officer: Well, as I understand it from the record, the last absence from the United States was 1957?

Miss Freedman: No, the last was 1959 when he attended his father's funeral in 1959, April 25, 1959.

Mr. Schiano: Exhibit 3 recites 1957 and exhibit 3 was corrected to 1959.

Miss Freedman: That is right. That was the last.

Special Inquiry Officer: Is it also— And the return was when?

Miss Freedman: The same day in 1959.

Special Inquiry Officer: This was just for one day?

Miss Freedman: That is right.

Special Inquiry Officer: Is it agreed that if the Public Health were making their diagnosis with regard to the 1959 entry rather than the 1955 entry that they would make the same finding?

Miss Freedman: That is correct.

Mr. Schiano: We would enter the same stipulation on the basis of that entry as well.

Special Inquiry Officer: In other words I think it would be rather silly at this point to re-submit the evidence to Public Health and ask them to re-certify as to the 1959 entry rather than the 1955 entry?

Miss Freedman: Correct.

Special Inquiry Officer: All right, then I will take the last entry as April 25, 1959. Do you have anything further, Mr. Schiano?

Mr. Schiano: No, sir.

Special Inquiry Officer: All right then, this hearing will be closed and I will reserve decision and render my decision in writing.

[fol. 23]

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

File: A-10 082 545—New York, N.Y.

In the Matter of

CLIVE MICHAEL BOUTILIER, Respondent,

In Deportation Proceedings.

DECISION OF SPECIAL INQUIRY OFFICER—August 5, 1965

Charge:

I & N Act—Section 241(a)(1) (8 USC 1251(a)(1))—excludable at time of entry; psychopathic personality, Section 212(a)(4) I & N Act.

Application:

Termination of proceedings.

In Behalf of Respondent:

Blanch Freedman, Attorney-at-law, 299 Broadway, New York, N.Y.

In Behalf of Service:

Vincent A. Schiano, Trial Attorney, New York, N.Y.

[fol. 24] The respondent is a 31 year old single male alien, a native and citizen of Canada who last entered the United States at New York, New York on or about April 25, 1959 at which time he was returning from a short trip to Canada. The record further establishes that the respondent was admitted to the United States at New York, New York on June 22, 1955 as a nonquota immigrant, in possession of

an immigrant visa issued to him by the American Consulate General at Toronto, Canada.

The order to show cause charges that the respondent is deportable from the United States under Section 241(a)(1) of the Immigration and Nationality Act by reason of the fact that at the time of his entry on June 22, 1955 he was an alien afflicted with a psychopathic personality, to wit, a sexual deviate.

This allegation of deportability is based on a certification by the United States Public Health Service dated January 17, 1964 (Exhibit 4) that at the time of the respondent's admission to the United States for permanent residence on June 22, 1955 he was an alien afflicted with a Class A condition, namely, psychopathic personality, sexual deviate.

It was stipulated and agreed between the Trial Attorney and the attorney for the respondent that the same certification would be made by the United States Public Health Service in relation to the respondent's most recent entry into the United States on April 25, 1959 and that no useful purpose would be served by re-submitting the evidence to the United States Public Health Service merely for the [fol. 25] purpose of having them issue a new certification relating to the 1959 arrival rather than the 1955 arrival.

The certification by the United States Public Health Service was based on a sworn statement taken from the respondent on January 13, 1964 (Exhibit 3). It was stipulated and agreed by the attorney for the respondent that this record of sworn statement correctly reflected the respondent's testimony on January 13, 1964 with certain minor exceptions relating to dates which are set forth in detail in Exhibit 3-B.

It was further stipulated and agreed between the Trial Attorney and the attorney for the respondent that the respondent declined to submit himself for personal examination by the United States Public Health Service, that the respondent did not intend to submit the personal psy-

chiatric testimony of a psychiatrist, although he has submitted the written opinion of two psychiatrists, Dr. Edward F. Falsey (Exhibit 6) and Dr. Montague Ullman (Exhibit 7), both of whom concede that the respondent has been a homosexual for a number of years but conclude that by reason of such sexual deviation the respondent is not a psychopathic personality.

It was further stipulated and agreed between the Trial Attorney and the attorney for the respondent that no useful purpose would be served by submitting this additional psychiatric material to the United States Public Health Service because these reports did not in any way raise an issue as to the respondent's sexual deviation, and that furthermore if the United States Public Health Service doctors who issued the certificate of January 17, [fol. 26] 1964 were to appear in the course of these proceedings for examination, they would testify that the respondent prior to his arrival in 1955 and subsequent thereto until date has been a sexual deviate of the homosexual type and that under the applicable regulations of the United States Public Health Service (as set forth in Exhibit 8) they are required to issue a Class A certificate that the respondent was afflicted with a psychopathic personality at the time of his arrivals in the United States because he was a sexual deviate.

The attorney for the respondent has waived the personal appearance and cross examination of the United States Public Health Service doctors on the basis of her understanding that this would be their testimony and has in fact been their testimony in all the similar cases where they have appeared for cross examination.

In substance, therefore, the attorney for the respondent is raising the purely legal question of the sustainability of the charge contained in the order to show cause and has applied for no form of discretionary relief from deportation.

Exhibit 3 establishes that the respondent began his homosexual activities at the age of fourteen and from the age

of sixteen to the date of his first entry into the United States, about six years later, he engaged in homosexual activities on an average of three or four times a year. After his entry into the United States on June 22, 1955 he continued to have homosexual relations with other men with about the same frequency as before. For about seven years since his arrival in the United States he shared an [fol. 27] apartment with another man of homosexual inclination with whom he also had homosexual relations.

No serious question has been raised either by the respondent, his counsel or the psychiatrists who have submitted reports on the respondent as to his sexual deviation.

The record further establishes that the respondent was arrested on October 2, 1959 and charged with sodomy, which charge was reduced to assault and after six months dismissed because of the absence of the complaining witness.

The sole question which has been raised is the propriety of the United States Public Health Service following its regulations and concluding that the respondent is mandatorily classifiable as a psychopathic personality once he has been found to be a sexual deviate.

The text of Senate Report No. 1137 (82nd Congress, 2nd Session, January 29, 1952) indicates that the Public Health Service advised Congress that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect is sufficiently broad to provide for the exclusion of homosexuals and sex perverts and that the change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates. Whatever the phrase "psychopathic personality" might mean to the psychiatrists, to the Congress it was intended to include homosexuals and sex perverts.

It may well be that in psychiatric circles the term "psychopathic personality" does not have a precisely defined connotation and that those connotations which might be [fol. 28] agreed upon by the majority of psychiatrists do not, even in the view of those psychiatrists, follow inevi-

tably from any finding of homosexuality or sexual deviation.

However, we are not here concerned with the niceties of meaning indulged in by psychiatrists, but rather with words of legal art which, whatever they may mean elsewhere, to the Congress which enacted the Immigration and Nationality Act included homosexuality and sex perverts as those terms are commonly understood. Accordingly, I find that the Government has sustained its burden of establishing that the respondent is deportable on the charge contained in the order to show cause. The respondent has indicated that if ordered deported he wishes to be sent to Canada and has no fear of returning to that country.

Order: It Is Ordered that the respondent be deported from the United States to Canada on the charge contained in the order to show cause.

Ira Fieldsteel, Special Inquiry Officer.

[fol. 29]

U. S. Department of Justice

Board of Immigration Appeals

Order and Decision of Board of Immigration Appeals—January 12, 1966

January 12, 1966

File: A-10082545—New York

In re: Clive Michael Boutilier

In Deportation Proceedings

Appeal

Oral Argument: November 3, 1965.

On behalf of respondent: Blanch Freedman, Esq., 299 Broadway, New York, New York 10007.

On behalf of I&N Service: R. A. Vielhaber, Esq.

Charges:

Order: Sec. 241(a)(1), I&N Act (8 USC 1251(a)(1))—Excludable at time of entry; psychopathic personality, Section 212(a)(4), I&N Act.

Lodged: None.

Application: Termination of proceedings.

Respondent appeals from the order of the special inquiry officer requiring his deportation upon the charge stated in the caption. The appeal will be dismissed.

Respondent, a 32-year-old single male, a native and citizen of Canada, was admitted for permanent residence on June 22, 1955 and last entered the United States on about April 25, 1959 after a one day visit to Canada. The Service charges that at the time of respondent's original entry he [fol. 30] was a homosexual and was, therefore, excludable as a psychopathic personality. No serious question is raised as to whether respondent was a homosexual at the time of his admission for permanent residence. Counsel's basic contentions are that Congress did not intend to exclude homosexuals who were not also psychotic and that the term "psychopathic personality" as applied by the Board is void for vagueness.

The arguments advanced by counsel in her scholarly brief are similar to those previously considered by the Board in other cases in which we have held that the term "psychopathic personality" is a term of art under the immigration laws and that it includes an alien upon mere proof that he is a homosexual (*Matter of La Rochelle*, A-7128195, December 1, 1965, Int. Dec. ——; *Matter of Lavoie*, Int. Dec. 1481; *Matter of R-*, 9 I&N Dec. 393; *Matter of S-*, 8 I&N Dec. 409; *Matter of P-*, 7 I&N Dec. 258). Further evidence that it was the intent of Congress to include the sexual deviate in the category of the psychopathic personality is shown by the recent action of Congress in making "sexual deviation" a ground of exclusion to resolve any doubt that a homosexual was to be excluded (H.R.

Rep. No. 745, 89th Cong., 1st Sess. 16; S.Rep. No. 748, 89th Cong., 1st Sess. 18-19). This action which counsel views as only an expression of current thinking is in our opinion a clarification of what was intended in the prior law. We, therefore, think it proper to sustain the charge here upon proof of the existence of only a homosexual condition.

Counsel contends the Board's interpretation renders the statute void for vagueness. We believe the interpretation is required by the history of the act and judicial interpretations; the constitutional aspect is not one we are authorized to rule upon.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

[fol. 31]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 429—September Term, 1965.

(Argued June 2, 1966.)

Docket No. 30274

CLIVE MICHAEL BOUTILIER, Petitioner,

v.

THE IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Before: Moore, Smith and Kaufman, Circuit Judges.

OPINION—July 8, 1966

Petition for review of an order directing petitioner's deportation as one who upon entry into this country was

a "psychopathic personality" within the meaning of section 212(a)(4) of the Immigration and Naturalization Act of 1952, 8 U. S. C. (1964 ed.) §1182(a)(4).

Dismissed.

Blanch Freedman, New York, N. Y. (David M. Freedman, on the brief), for petitioner.

[fol. 32] Francis J. Lyons, Special Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, James G. Greilsheimer, Special Assistant United States Attorney, on the brief), for respondent.

KAUFMAN, Circuit Judge:

Although a relatively young segment of contemporary society prides itself on its readiness to cast off conventional and tested disciplines and to experiment with nonconformance and the unorthodox merely to act out its contempt for traditional values, certain areas of conduct continue to be as controversial in modern and *beau monde* circles as they were in bygone and more staid eras. Homosexual behavior, despite Sigmund Freud[1] and other noted authors,[2] remains such a fervently debated issue that too often emotions on both sides obscure reason. But, the craft of judging requires a personal detachment—as far as it is humanly possible—so that issues which are apt to overwhelm the emotions may be approached in the dispassionate manner fitting for a judicial determination.

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[1] "Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development." Freud, "Letter to an American Mother," published in 107 Am. Jour. Psych., 786-87 (1951).

[2] Kinsey, Sexual Behavior in the Human Male, 623 (1948).

See Learned Hand, "Fifty Years of Federal Judicial Service," published in Handbook for Judges (1961). Our function in this case, therefore, is not to approve or disapprove of the conduct we are examining; nor is it necessary for us to determine the mores of the community. [fol. 33] Rather, our duty is simply to interpret a statute and to make the traditional determination as to its application.

I.

Clive Michael Boutilier petitions for review of a final order of the Board of Immigration Appeals directing his deportation to Canada as one who upon entry into this country was a homosexual and, thus, was afflicted with a "psychopathic personality" within the meaning of section 212(a)(4) of the Immigration and Naturalization Act of 1952 (Act), 8 U. S. C. (1964 ed.) §1182(a)(4).* For the reasons set forth below, we uphold the order of the Board and dismiss the petition for review.

The basic facts, which were not seriously disputed, lend themselves to simple statement. Boutilier, a native and citizen of Canada, was admitted into the United States for permanent residence on June 22, 1955 at the age of 21. Since that time, with the exception of short trips outside the country, he has continuously resided here and has been gainfully employed as a building maintenance man, most recently by a large company in Manhattan. Boutilier's mother and step-father also live in New York and three of his five brothers and sisters reside in the United States.

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*Section 212(a) provides in pertinent part:

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * * * *

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect; . . .

In September 1963, as part of Boutilier's application to file a petition for citizenship, he submitted an affidavit to a naturalization examiner forthrightly admitting that he had been arrested in October 1959 on a charge of sodomy, [fol. 34] in violation of New York Penal Law, §690. Boutilier noted that he had been discharged on his own recognizance and that the charge was reduced to simple assault and ultimately dismissed when the complaining party failed to appear in court. Boutilier freely acknowledged that the circumstances leading to the arrest involved acts of anal sodomy and fellatio with a minor—a 17-year-old male.

This affidavit was forwarded to the Immigration Service and, in January 1964, an Immigration Officer informed Boutilier that the government desired additional information. Submitting another sworn statement, Boutilier revealed the full history of his sexual deviate behavior. He stated that his first homosexual experience occurred in Canada when he was approximately 14 years of age; the act was involuntary and Boutilier played a passive role. However, from the time he was 16 until he came to the United States 5 years later, Boutilier voluntarily engaged in homosexual activity on an average of 3 or 4 times a year.[4] These experiences all involved fellatio and Boutilier was generally the active participant. After Boutilier entered this country in 1955, his homosexual conduct continued with approximately the same frequency. Indeed, Boutilier shared an apartment with a male with whom he had sexual relations and, as the result of Boutilier's admitted homosexual condition and a Selective Service psychiatric examination, he was classified 4-F by the Selective Service System.

Immigration officials dispatched this second and more complete statement to the United States Public Health Service for its expert views as to whether there were grounds for concluding that Boutilier was excludable from

[4] Boutilier acknowledged that, occasionally, he also engaged in heterosexual conduct.

[fol. 35] the United States when he entered in 1955. After reviewing this document, the Public Health Service issued a certificate stating that, on the basis of the information furnished, it was of the opinion that Boutilier "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate, at the time of his admission to the United States for permanent residence on June 22nd, 1955."[5]

Armed with this certificate and the supporting documents, the government commenced deportation proceedings. At hearings held before a Special Inquiry Officer, Boutilier declined an opportunity for an *in personam* examination by Public Health Service doctors. He did, however, introduce two letters[6] from privately retained psychiatrists which were received in evidence without objection by the

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[5] The certificate was signed by Paul G. Smith, M.D., Senior Surgeon, United States Public Health Service, Chief of Psychiatry and by Maria Sarrigiannis, M.D., Medical Director, United States Public Health Service.

[6] One letter was signed by Edward F. Falsey, M.D. and dated March 2, 1964. It stated:

> On psychiatric examination of Mr. Boutelier [*sic*], there was no indication of delusional trend or hallucinatory phenomena. He is not psychotic. From his own account, he has a psychosexual problem but is beginning treatment for this disorder. Diagnostically, I would consider him as having a Character Neurosis, believe that the prognosis in therapy is reasonably good and do not think he represents any risk of decompensation into a dependent psychotic reaction nor any potential for frank criminal activity.

The second letter was in the form of a "Clinical Abstract" on the stationery of Montague Ullman, M.D., under date of March 30, 1965. In pertinent part, it stated:

> [Boutilier's] sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interest as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. My own feeling is that his own need to fit in and be accepted is so great that it far surpasses his need for sex in any form.

[fol. 36] government.[7] In addition, it was substantially agreed between the parties that this additional material would not cause the Public Health Service to change its certification and, accordingly, no purpose would be served by calling a Public Health Service doctor to testify. Based on the evidence and stipulations, the Special Inquiry Officer concluded that Boutilier had been a homosexual at the time of entering the United States and, thus, was excludable as one afflicted with a "psychopathic personality." On this basis, the Special Inquiry Officer ordered Boutilier deported, noting that the phrase "psychopathic personality" as used in section 212(a)(4) of the Act is not a medical formulation but is a legal term of art evincing a Congressional purpose to exclude from this country any alien who is shown to be a homosexual. After an unsuccessful appeal to the Board of Immigration Appeals, Boutilier asks us to vacate the order of deportation.

II.

Boutilier now urges that an actual medical examination by the Public Health Service was an indispensable prerequisite to its opinion that he was afflicted with a "psychopathic personality."[8] In support of this position, Boutilier relies on section 234 of the Act, 8 U. S. C. §1224, which directs that certification of the physical and mental condition of "arriving aliens . . . shall be made by medical [fol. 37] officers of the United States Public Health Service, who shall conduct all medical examinations and shall cer-

[7] The government noted, however, that it considered the phrase "psychopathic personality" appearing in Dr. Ullman's letter to be used in a medical frame of reference and not as a legal term of art.

[8] It could be urged that Boutilier is estopped from making this contention in view of his rejection of the government's offer to have the Public Health Service conduct an *in personam* examination. But, in view of the serious consequences of a deportation order and the government's failure to press this point, we shall make our determination on the merits.

tify, for the information of the immigration officers and the special inquiry officers, any physical or mental defect or disease observed . . . " See also 42 C. F. R. §34.1. Boutilier urges that if an exclusion proceeding is to be valid, adherence to these procedures is required. See *United States ex rel. Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949).

While this contention possesses surface plausibility, it is spurious and has a fatal flaw: it glosses over the basic and fundamental distinction between exclusion and deportation proceedings. Boutilier's ouster was directed because he was "excludable" in 1955 as one afflicted with a "psychopathic personality." But, this is not to say that the process by which his expulsion was ordered was an exclusion proceeding. On the contrary, section 241(a) of the Act, 8 U. S. C. (1964 ed.) §1251(a), expressly provides that "any alien in the United States . . . shall . . . *be deported* who . . . at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry . . . " (emphasis added).

Thus, section 234 and the cases and regulations which Boutilier cites are not in point; they describe requirements which are applicable solely to exclusion proceedings and have nothing to do with deportation procedures—our main concern here and the path to be followed is laid down in section 242(b) of the Act, 8 U. S. C. §1252(b). We note, in this connection, that Boutilier does not claim that the government failed to comply with the rules and regulations which guide the conduct of deportation proceedings.

The confusion between "exclusion" and "deportation" is also at the root of Boutilier's argument that he is being expelled on a non-statutory ground. Boutilier asserts that while affliction with a "psychopathic personality" may [fol. 38] furnish a basis for exclusion, this term does not authorize deportation. We find no merit in this suggestion. Section 241, as we have noted, authorizes the deportation of any alien who could have been excluded upon entering the United States. While this form of "delayed exclusion" has not been altogether free from criticism, see *Note, Limita-*

tions on Congressional Power to Deport Resident Aliens Excludable as Psychopaths at Time of Entry, 68 Yale L. Jour. 931, 935 (1959), without the provision, an imprimatur would be placed on deception of immigration officials at time of entry. *Developments in the Law: Immigration and Nationality,* 66 Harv. L. Rev. 643, 682 (1953). The function served by deportation in cases where the petitioner was excludable is to furnish a backstop or check designed to intercept those whom Congress believed should not have been admitted into the United States in the first instance.

III.

Despite Boutilier's arguments to the contrary, we believe the term "psychopathic personality" as employed in section 212(a)(4) reflects a Congressional purpose to prevent alien homosexuals from obtaining admission into this country. It was employed as a term of art to be interpreted by what Congress intended as a guide, and not to be left to the vagaries and honest but conflicting theories of psychiatry for determination.[9] The legislative history of the Act of 1952 and of the various bills and resolutions which gave rise to it leaves no room for doubt that Congress intended [fol. 39] to exclude homosexuals and would have expressly so provided if the Public Health Service had not advised that the term "psychopathic personality" alone was sufficient to accomplish this result.

Prior to 1952, the Immigration laws employed the language "persons of constitutional psychopathic inferiority," as those subject to exclusion, section 3 of the Act of February 5, 1917, 39 Stat. 875; but, the 1952 Act changed this

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[9] It is also interesting that some psychiatrists have recently used the term "sociopath" in lieu of "psychopathic personality." See Hinsie & Campbell, Psychiatric Dictionary, 600, 682 (Third Ed. 1960). And, psychiatrists, at times, have changed their minds, as to whether "psychopathic personality" constitutes a "mental disease or defect" for purposes of determining criminal responsibility. See *Blocker* v. *United States,* 288 F. 2d 853, 860 (D. C. Cir. 1961), Burger, *J.* (concurring).

terminology to the more modern concept of "psychopathic personality." Initially, the Senate Committee on the Judiciary reported that "the purpose of the provision against 'persons with constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with psychopathic personality,' and that the classes of mental defectives should be enlarged to include homosexuals and other sex perverts." S. Rep. No. 1515, 81st Cong., 2d Sess., 345 (1950).

As a result, a series of proposed bills were drafted, each of which provided for the exclusion of "aliens afflicted with psychopathic personality" and "aliens who are homosexuals or sex perverts." See, e.g., S. 3455, 81st Cong., 2d Sess., §212(a) (1950); S. 716, 82d Cong., 1st Sess., §212(a) (1951). In S. 2550, 82d Cong., 2d Sess., §212(a) (1952), however, express reference to "aliens who are homosexuals or sex perverts" was eliminated for the following reason:

> Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is suffi- [fol. 40] ciently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.* S. Rep. No. 1137, 82d Cong., 2d Sess., 9 (1952) (emphasis added).

While S. 2550 was not enacted, the report accompanying H. R. 5678, the bill which ultimately became the Act of 1952, contained similar reference to observations by the Public Health Service. Commenting on the medical aspects of a predecessor bill (H. R. 2379, 82d Cong., 1st Sess.,

§212(a) (1951)), which had placed "homosexuals or sex perverts" in a separate excludable category, the Public Health Service recommended that this separate rubric be eliminated and that the phrase "psychopathic personality" —the terminology ultimately enacted—be employed. The Service noted that this phraseology would satisfy the Congressional objective of excluding homosexuals and perverts because ordinarily sexual deviation was a manifestation of a psychopathic personality. In reporting out the bill, which was to become the 1952 Act, the House Judiciary Committee indicated that, with an exception not here relevant, it had accepted the Public Health Service's recommendations. H. R. Rep. No. 1365, 82d Cong., 2d Sess., 46-48 (1952).

Thus, on the basis of this brief survey of the legislative history of section 212(a)(4), it seems fairly clear that Congress utilized the phrase "psychopathic personality" not as a medical or psychiatric formulation but as a legal term of art designed to preclude the admission of homosexual aliens into the United States. "[W]hatever the phrase 'psychopathic personality' may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts. It is that intent which controls here." *Quiroz* [fol. 41] v. *Neelly*, 291 F. 2d 906, 907 (5th Cir. 1961). See also, *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565 (S. D. N. Y. 1959), *affirmed without opinion sub nom. Ganduxe y Marino* v. *Esperdy*, 278 F. 2d 330 (2d Cir.), *cert. denied*, 364 U. S. 824 (1960); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412-413, n. 2 (2d Cir. 1954) (concurring opinion).[19]

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[19] Indeed, because of contrary interpretations in the Ninth Circuit, discussed in section IV of this opinion, *infra*, Congress recently amended section 212(a)(4) to provide expressly what its reports have said over and over again—that "sexual deviates" are excludable. Section 15(b) of the Act of October 3, 1965, 79 Stat. 919. The committee reports of both houses state:

> To resolve any doubt the Committee has specifically included the term "sexual deviation" as a ground of exclusion in this bill. H. R. Rep. No. 745, 89th Cong., 1st Sess., 16 (1965). S. Rep. No. 748, 89th Cong., 1st Sess., 19 (1965).

Our review of the legislative history of section 212(a)(4) also disposes of Boutilier's contention that the Public Health Service exceeded its statutory authority by classifying all homosexuals as persons "afflicted with psychopathic personality." Paragraph 6-b of the United States Public Health Service Manual provides that in the category of psychopathic personality "will be classified those applicants who are diagnosed as sexual deviates." While some psychiatrists believe that all homosexuals cannot properly be termed psychopaths,[11] Paragraph 6-b also notes that the phrase "psychopathic personality" is a "legal" term. Moreover, as we have observed, since Congress in- [fol. 42] tended to exclude homosexual aliens, the Public Health Service cannot be faulted for implementing this statutory purpose by utilizing an automatic rule which functions in such a way as to accomplish this objective.[12]

IV.

Placing principal reliance on *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (9th Cir. 1962), *remanded on other grounds*, 37 U. S. 449 (1963), Boutilier vigorously maintains that section 212(a)(4) is void for vagueness and that the order direct-

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[11] See, e.g. n. 6, *supra*.

Dr. Paul G. Smith who signed the certification of Boutilier's condition as a "psychopathic personality" testified that modern psychiatric theory does not espouse the proposition that a sexual deviate is *ipso facto* a constitutional psychopathic inferior or a psychopathic personality. *Matter of Anne-Lise Coppo*, a deportation proceeding, file No. A-6845593—New York (December 8, 1965).

But, as we have noted, in the context of this case, psychiatric definitions are not determinative of the legal purport of the term "psychopathic personality."

[12] We also reject Boutilier's contention that there was insufficient evidence of his "psychopathic personality" at the time of his entry into the United States to justify deportation. Boutilier's sworn statement describing in detail his homosexual activities in Canada provided more than ample proof of his excludable condition.

ing his deportation deprived him of due process. The Court of Appeals for the Ninth Circuit has found this argument persuasive and, citing *Fleuti*, has recently adhered to this view in a *per curiam* opinion, *Lavoie* v. *Immigration and Naturalization Service*, —— F. 2d —— (9th Cir. 1966). At the heart of Boutilier's argument is the notion that the term "psychopathic personality" lacked sufficient precision to convey adequate warning to him that post-entry homosexual conduct was proscribed. Upon examining the rationale of the void-for-vagueness doctrine, however, we conclude that it is inapplicable to section 212(a)(4).

Although it is a legal fiction that everyone is presumed to know the law, that precept does not always come to the aid of the prosecutor nor work against the transgressor. A corollary of this doctrine is that legislation must be sufficiently precise to afford adequate notice of the standards by which the individuals affected are required to guide themselves. "The underlying principle is that no man shall be held criminally responsible for conduct which he could [fol. 43] not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). While the void-for-vagueness doctrine is principally employed in the interpretation and application of criminal statutes, it is also relevant in considering legislation imposing civil sanctions. *Jordan* v. *De George*, 341 U. S. 223 (1951);[12] *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233 (1925); *Miller* v. *Strahl*, 239 U. S. 426 (1915); see generally, *Note, Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948).

We do not quarrel with Boutilier's contention that the term "psychopathic personality" is not a model of clarity.

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[12] In *De George*, the Supreme Court determined that the phrase "moral turpitude" appearing in the predecessor of section 241, 8 U. S. C. §1251(a) was not unconstitutionally vague. Significantly, section 241 which authorizes deportation of aliens who are convicted of at least two crimes involving "moral turpitude" attempts, unlike section 212(a)(4), to regulate post-entry conduct.

There is no denial that Congress sought assurance that the phrase would encompass homosexuals and sex perverts.[14] And, while the Public Health Service counseled that "psychopathic personality" was sufficiently broad to fulfill the Congressional objective of excluding sexual deviates, the Service candidly advised that, in terms of medical reference, the definition was "vague and indefinite," and that "no more appropriate expression can be suggested at this time." H. R. Rep. No. 1365, 82d Cong., 2d Sess., 46-47 (1952).

But all this does not establish that section 212(a)(4) is defective under the void-for-vagueness doctrine. The provision was never designed to regulate *conduct;* its function was to exclude aliens possessing certain *characteristics.* Had Boutilier, after entering the United States in 1955, commenced leading a life of impeccable morality, section [fol. 44] 212(a)(4) would still have been applicable to authorize his deportation. And, we emphasize that the section does not focus on Boutilier's post-entry behavior but on his condition at the time of entry into the United States. It is beyond contest that he was a homosexual long before leaving Canada. It is not without significance also that in *Fleuti,* the Court noted "the examining officer chose to rely heavily upon post-entry behavior." It may well be that the Court found it necessary, therefore, to determine whether the term "psychopathic personality" was sufficiently precise to afford adequate warning to Fleuti. In the case before us, however, while the Special Inquiry Officer credited Boutilier's sworn statement which described in detail the full history of his homosexual behavior, there is not the slightest indication that the Officer failed to understand that section 212(a)(4) was directed solely at a pre-entry condition. For these reasons, we do not consider *Fleuti* authoritative, and we believe that the order directing Boutilier's deportation did not constitute a denial of due process on the void-for-vagueness doctrine or any other

[14] See discussion of the legislative history of section 212(a)(4), *supra.*

grounds. We find that the clear design of Congress was to exclude homosexuals from entry into the country and this it has done in section 212(a)(4) by the use of the words "psychopathic personality." It is not our function to sit in judgment on Congress' wisdom in enacting the law. "Courts must reconstruct the past solution imaginatively in its setting and project the purposes which inspired [the law] . . ."[11] L. Hand, "The Contribution of an In-
[fol. 45] dependent Judiciary to Civilization," published in The Spirit of Liberty (1953).

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[11] The dissent, while possessing *ad hominem* appeal, falls into error by improperly shifting the focus from a legal exegesis to a medical explanation of the term "psychopathic personality." As Judge Moore noted in his dissent in *United States ex rel. Paktorovics* v. *Murff*, 260 F. 2d 610, 618 (2d Cir. 1958), "emotional reaction should not blind us to the fact that our immigration policy has been, and still should be, declared by Congress, and enforced by such officers of government as are so designated by Congress." Unfortunately, our dissenting colleague has failed to follow his own caveat.

Although his plea for "clemency" is quite moving, it is illustrative of the ease with which one can succumb in a case such as this to the temptation of permitting the emotions to overwhelm reason and enacted law. Congress has made its judgment, for better or worse, respecting the exclusion of homosexuals which we are not at liberty to alter. The dissent's parade of distinguished historical personages allegedly possessing homosexual attributes does not detract one iota from that conclusion. Indeed, under the current version of section 212(a)(4), see n. 10, *supra*, there is little doubt that some of these eminent gentlemen would be excludable.

Thus, while the house of horrors erected by our dissenting brother stimulates the imagination and arouses our sympathy, it is largely irrelevant. Congress studiously avoided turning this into a medical problem and did not authorize immigration officials to conduct a detailed psychiatric examination into the nature, frequency and variety of a particular homosexual's acts; rather, it enacted a clearcut rule of law: it determined that pre-entry homosexual behavior was to be a ground for exclusion. And, neither citations to the Sonnets of Michelangelo and Campanella, to the New York Times, nor even to Annie Get Your Gun will aid us in our statutory interpretation or change this simple fact of life.

We have considered Boutilier's other contentions and find them to be without merit.

The petition for review is dismissed.

MOORE, Circuit Judge (dissenting):

The majority upholds the deportation of a young man who arrived in this country in 1955, who has worked hard and gainfully ever since, who is respected in his work, and most of whose close relatives—including his mother, his stepfather, and three of his five brothers and sisters—reside in this country. The majority does so on the grounds that at the time the petitioner entered this country at the age of 21, he could have been excluded as one "afflicted with psychopathic personality" under §212(a)(4) of the [fol. 46] Immigration and Nationality Act, 8 U. S. C. §1182(a)(4), since he had had a number of homosexual experiences before coming to this country. The majority manifestly agrees with the Board of Immigration Appeals "that the term 'psychopathic personality' is a term of art and that it includes an alien upon mere proof that he is a homosexual."

Petitioner's homosexual experiences were revealed not in any proceeding at the time of original entry but solely as a voluntary disclosure some 8 years after entry (September 1963) in connection with a petition for naturalization. The admission of an arrest for sodomy in October 1959 (charge reduced and ultimately dismissed) led to a request for further information which petitioner again supplied voluntarily. The most adverse conclusion which can be derived from petitioner's statements is that petitioner engaged in sexual activity on a quite infrequent basis with both men and women during the five-year period before his coming to the United States.

Both the procedure and the statutory interpretation used by the immigration authorities in this deportation proceeding are not only offensive to, but, in my opinion, completely lacking in, due process, for interrelated reasons.

Appellant was adjudged "afflicted with psychopathic personality" without any formal examination by qualified psychiatrists. The majority states that appellant's history was referred to the Public Health Service "for its expert views as to whether there are grounds for concluding that Boutilier was excludable . . ." The word-picture suggests a careful and particularized analysis by distinguished psychiatrists to determine whether appellant was so disturbed as to be "afflicted with psychopathic personality." Nothing could be further from what actually happened. The Public Health Service simply looked at appellant's statement in [fol. 47] which he admitted having had homosexual experiences before he came to this country, and automatically stamped him a "psychopathic personality, sexual deviate," following the directive of the Public Health Service manual that under the category of psychopathic personality "will be classified those applicants who are diagnosed as sexual deviates." This was not the result of process, "due" or otherwise; it was the result of a mere fiat in a Public Health Service manual which labels as "psychopathic personalities" many who upon proper psychiatric examination might be found to possess no psychopathic symptoms.[1]

This lack of careful case-by-case determination cannot be upheld simply because this is a proceeding to deport rather than a proceeding to exclude. If anything, greater procedural safeguards are constitutionally required in cases of deportation than in cases of exclusion, because of the greater hardship involved in uprooting an alien from a country once he has developed economic and social ties there and slackened or severed those which bound him to his country of origin. Compare *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950) (alien can be excluded without a hearing) with *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903) (alien sought to be deported

[1] See footnote 11 of the majority opinion.

is constitutionally entitled to a hearing) and *Kwong Hai Chew* v. *Colding*, 244 U. S. 590 (1953) (resident alien seeking re-entry is constitutionally entitled to a hearing); see also *Wong Yang Sun* v. *McGrath*, 339 U. S. 33 (1950) (administrative hearing in deportation case must conform to the requirements of the Administrative Procedure Act).

The lack of careful—in fact the lack of any—medical examination and analysis was not peculiar to the proceedings against the present petitioner, but results from a long-[fol. 48] standing statutory interpretation, promulgated by the immigration authorities and embodied in the Public Health Service manual, that mere proof of homosexuality constitutes a demonstration of the existence of "psychopathic personality." Under such circumstances, it would have been futile for the petitioner to request an examination by a board of Public Health Service doctors.

I cannot impute to Congress an intention that the term "psychopathic personality" in the 1952 amendments of the Immigration and Nationality Act be construed to cover anyone who had ever had a homosexual experience. Professor Kinsey estimated that "at least 37 per cent" of the American male population has at least one homosexual experience, defined in terms of physical contact to the point of orgasm, between the beginning of adolescence and old age. Kinsey, Pomeroy & Martin, Sexual Behavior in the Human Male 623 (1948). Earlier estimates had ranged from one per cent to 100 per cent. *Id.* at 616-622. The sponsors of Britain's current reform bill on homosexuality have indicated that one male in 25 is a homosexual in Britain.[2] To label a group so large "excludable aliens" would be tantamount to saying that Sappho,[3] Leonardo da

[2] N. Y. Times, July 6, 1966, §1, p. 7, col. 1.

[3] Whom Plato called the Tenth Muse. Loeb Classical Library, Greek Anthology, Vol. 3, p. 281. See Patrick, Sappho and the Island of Lesbos (1912).

Vinci,[4] Michelangelo,[5] Andre Gide,[6] and perhaps even Shakespeare,[7] were they to come to life again, would be [fol. 49] deemed unfit to visit our shores. Indeed, so broad a definition might well comprise more than a few members of legislative bodies.[8]

At most, the legislative history of the 1952 amendments indicates that Congress intended to exclude those who were "sexual deviates" at the time of entry into this country, see S. Rep. No. 1137, 82d Cong., 2d Sess. 9 (1952). The term "sexual deviate" suggests someone with a long-lasting and perhaps compulsive orientation towards homosexual or otherwise "abnormal" behavior. The Public Health Service report on which the House Judiciary Committee relied in its discussion of the bill as finally enacted, see H. R. Rep. No. 1365, 82d Cong., 2d Sess. 46-8 (1952), indicates a narrower definition of the term "psychopathic personality." That report states that "psychopathic personalities" are "disorders of the personality . . . characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior," and that those "psychopathic personalities" who are "ill primarily in terms of society and the prevailing culture . . . frequently [evidently not always] include those . . . suffering from sexual deviation." U. S.

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[4] See The Notebooks of Leonardo da Vinci 189, 223 (P. Taylor ed. 1960).

[5] *Cf.* Sonnets of Michelangelo and Campanella (J. A. Symonds trans. 1878).

[6] *Cf.* Gide, L'Immoraliste (1902).

[7] See, *e.g.*, Sonnets 20, 33, 108.

[8] *Cf.* remarks of Sir Cyril Osborne, opposing reintroduction into the House of Commons of the current British bill on homosexuality: "If this House were representative of the country, then there would be at least 30 homos in this House." Upon being asked to name them, however, Sir Cyril stated that in his 21 years in Parliament he had never encountered "one case of a homo in this House." N. Y. Times, July 6, 1966, §1, p. 7, col. 1.

Code Cong. & Ad. News 1700-1701, 82d Cong., 2d Sess. (1952). This legislative history suggests that Congress contemplated an inquiry in each case, to be performed by skilled psychiatrists, into whether the homosexual activity of a given individual amounted to such a "disorder of the personality" as to constitute "psychopathic personality." [fol. 50] Even assuming that Congress intended the term "psychopathic personality" to cover anyone who was a sexual deviate at the time of entry, petitioner had no way of knowing that "psychopathic personality" meant what Congress intended it to mean. "Psychopathic personality" may not be so vague as to be meaningless in all applications, as some have suggested, see Note, Limitations on Congressional Power to Deport Resident Aliens as Psychopaths at Time of Entry, 68 Yale L. J. 931 (1959), even though the Public Health Service itself has admitted that the term is "vague and indefinite." H. R. Rep. No. 1365, 82d Cong., 2d Sess. 46-7 (1952). The term "necessitates a personal estimate of community mores," *ibid.* at 943 n. 46; but so does the term "moral turpitude," held not unconstitutionally vague in *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951). Moreover, the term has been given some concreteness by judicial definition. See *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 411 (2d Cir. 1956); *United States ex rel. Leon* v. *Murff*, 250 F. 2d 436, 439 (2d Cir. 1937). However, the courts have said that those afflicted with "psychopathic personality" are "individuals who show a life-long . . . tendency not to conform to group customs, and who habitually misbehave so flagrantly that they are continually in trouble with the authorities." *Flores-Rodriguez, supra*, at 411 (discussing the earlier statutory term "constitutional psychopathic inferiority," but suggesting that it was largely interchangeable with "psychopathic personality"); see *Leon, supra*, at 439 (citing a Public Health Service regulation apparently no longer in effect providing that "there shall be certified as cases of constitutional psychopathic inferiority all psychopathic characters such as . . . persons

who because of eccentric behavior, defective judgment or abnormal impulses are in repeated conflict with social customs and constitutional authorities"); see also Note, 68 [fol. 51] Yale L. J. 931, 940 (1959) ("identifying characteristic" of "psychopathic personality" "is a long-standing pattern of culturally unacceptable behavior"). In the present case, there was no evidence to show that petitioner's sexual deviation was such as to put him in repeated conflict with the authorities. His discussion of his homosexual activities before and after his entry into this country indicates that they were consensual acts between adults, almost always in private places. Contrast *Flores-Rodriguez, supra* (blatant exhibitionist solicitation in public places). In short, neither the term "psychopathic personality" nor its interpretations by the courts prior to petitioner's entry gave petitioner "sufficiently definite warning . . . when measured by common understanding and practices," *Jordan* v. *DeGeorge*, 341 U. S. 223, 231-32 (1951), that his conduct could serve as a basis for exclusion or deportation.

Had the petitioner known that sexual deviation[9] at the time of entry would be automatic grounds for exclusion, there is considerable reason to believe that he could have modified his behavior so that he could not be considered a deviate at the time of entry. He was young, intelligent, and responsible. While he had engaged in homosexual acts from the age of 16 to the age of 21, he had also had sexual relations with women three or four times during this period. Dr. Montague Ullman, Director of Psychiatric

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[9] A term which itself raises problems of vagueness. Deviation from what norm? When so much attention is being focused on sexual practices, see, *e.g.*, Kinsey, Pomeroy & Martin, *op. cit. supra*, and Masters & Johnson, Human Sexual Response (1966), and when so many efforts, scientific and otherwise, are being made to discover how the human race can become adjusted to doing what should come naturally, *cf.* Berlin, Annie Get Your Gun 21 (1947), it must be realized that sexual gratification is often achieved in divers ways which may well deviate from popular conceptions of a norm.

Services in the Maimonides Hospital of Brooklyn and Professor of Psychiatry at the State University of New [fol. 52] York, described petitioner's condition as late as March 1965 in the following terms:

> "The patient has sexual interest in girls and has had intercourse with them on a number of occasions . . . His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality."

Another psychiatrist who examined petitioner, Dr. Edward F. Falsey, concluded that petitioner "is not psychotic" and that "the prognosis in therapy is reasonably good."

In brief, petitioner has been ordered deported because of the existence at the time of his entry into this country of a psychological condition which he probably would have been able to correct had he had any reasonable warning that the existence of the condition could serve as a basis for exclusion or, still more drastic, for deportation after entry. He received no warning. I agree with the Ninth Circuit that to uphold a deportation order under these circumstances is repugnant to due process. *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (9th Cir. 1962), *remanded on other grounds*, 374 U. S. 449 (1963); *Lavoie* v. *Immigration and Naturalization Service*, —— F. 2d —— (9th Cir. 1966).

[fol. 53]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CLIVE MICHAEL BOUTILIER, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

JUDGMENT—July 8, 1966

A petition for review of an order of the Board of Immigration Appeals.

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the petition be and it hereby is dismissed.

A. Daniel Fusaro, Clerk.

[fol. 54] Clerk's certificate to foregoing record (omitted in printing).

[fol. 55]

SUPREME COURT OF THE UNITED STATES

No. 440—October Term, 1966

CLIVE MICHAEL BOUTILIER, Petitioner,

v.

THE IMMIGRATION AND NATURALIZATION SERVICE.

ORDER ALLOWING CERTIORARI—November 7, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.